No. 85-2079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,
Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

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INTRODUCTION

In our opening brief, we demonstrated that a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. §§ 1132 and 1145, over an action by the trustees of multi-employer employee benefit plans to collect contributions from a delinquent employer, where the employer's alleged obligation to make contributions arises from its duty under Section 8(a)(5) of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 158 (a)(5), to continue to adhere to the terms of the expired collective bargaining agreement which provided for such contributions. Nothing in the answering briefs of Respondent and its *amici* refutes our position.

ARGUMENT

I. The Language Of Section 515 Is Properly Read To Require Employers To Comply With All Their Legal Obligations To Make Contributions To Multiemployer Plans Based On The Terms Of The Collective Bargaining Agreement.

Respondent first argues (Resp. Br. 8-13) that the plain language of Section 515 of ERISA authorizes federal courts to adjudicate only collection claims arising under unexpired collective bargaining agreements. But, as noted in our opening brief (at 13-15), Section 515's language is not so limited. It states that "[e]very employer who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of . . . such agreement" (29 U.S.C. § 1145). Respondent *is* "obligated to make contributions." That obligation is quite properly described as one "under the terms of a collectively bargained agreement": the source of Respondent's obligation to Petitioners is the legal requirement that it honor the terms of the agreement into which it entered. That the source of that requirement is the NLRA rather than contract law does not take this case out of the language of Section 515. *See American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970).

Moreover, contrary to Respondent's suggestion, the separate reference in the definition of the term "obligation to contribute" in Section 4212(a) of ERISA, 29 U.S.C. § 1392(a), to contribution obligations arising "as a result of a duty under applicable labor-management relations law" in no way suggests that such NLRA-based contribution obligations are not also covered by Section 515. The separate reference to NLRA-based contribution obligations in the definition of the term "obligation to contribute" in Section 4212(a) results from the particular

function that that statutory provision serves in the "withdrawal liability" part of the statute. An employer incurs "withdrawal liability"—*i.e.*, liability for a portion of a multiemployer pension plan's unfunded vested benefits—when it "withdraws from a multiemployer plan in a complete withdrawal" (29 U.S.C. § 1381(a)); a "complete withdrawal" occurs when an employer "permanently ceases to have an obligation to contribute under the plan" (29 U.S.C. § 1383(a)(1)); and Section 4212(a) defines this "obligation to contribute" (29 U.S.C. § 1392(a)). Specifically, it lists in detail the various contribution obligations that do and do not affect the imposition of withdrawal liability. Section 515, by contrast, does not separately list the contribution obligations that are (and are not) covered by its terms because it is all-inclusive and admits no exceptions.

Finally, the clause "the terms of" cannot be read out of Section 515's phrase "under the terms of a collectively bargained agreement," as Respondent would dismiss the clause. The clause is not "obscure"; as noted above, it has a well-established meaning in labor-management relations law, a meaning that was understood by the Congress enacting Section 515 (as Section 4212(a) evidences). Nor is the clause "trivial"; as noted in our opening brief (at 22 n.9), it is part of a Congressional enactment and, for that reason alone, is entitled to independent legal meaning.

II. The Legislative History Shows That The Broader Interpretation Of Section 515 (As Providing Trustees Of Multiemployer Plans With A Single, Efficient Cause Of Action For The Collection Of All Delinquent Contributions, Including Delinquencies Attributable To NLRA-Based Obligations) Better Serves The Purposes Expressed By Congress.

Respondent similarly errs in suggesting (Resp. Br. 14-24) that the legislative history shows that Congress enacted Section 515 *solely* to strengthen the ability of trust

funds to enforce employers' contractual contribution obligations. It is true, of course, that the failure of employers to comply with contractual contribution obligations served as the paradigm for Congress's discussions concerning the delinquency problem. But, as explained in both our opening brief (at 15-20) and the brief *amicus curiae* of the United States (at 14-18), the legislative history shows that Congress viewed the problem of delinquencies as part of a larger problem—the problem of preserving the financial health of multiemployer employee benefit plans—and that Section 515 was intended to be a part of the solution to this larger problem. Interpreting Section 515 as providing plan trustees with a single, efficient remedy for the collection of all delinquent contributions, including delinquencies attributable to NLRA-based obligations, thus promotes Congress's larger purpose in enacting the legislation.

In addition, Respondent's suggestion (Resp. Br. 23) that Section 515 was merely "the technical change" necessary for the trust funds to take advantage of the mandatory remedies of Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), is belied by the legislative history. As noted in our opening brief (at 16), the version of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208, initially passed by the House in 1980 amended Section 502 to authorize a court to award, if the multiemployer plan so provides, reasonable attorneys' fees, costs of action, and liquidated damages (in an amount up to 20 per cent of the delinquency) in any civil action to collect delinquent contributions. Prior to the MPPAA, such civil actions to collect delinquent contributions were brought under Section 301 of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185, or Section 502 of ERISA, 29 U.S.C. § 1132, or both. *See, e.g., Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *Carpenters Local Union No. 1846 v.*

Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (D. D.C. 1980), *rev'd*, 681 F.2d 1 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983). While the remedial provisions of the version of the MPPAA initially passed by the House in 1980 were discretionary, that version makes clear that Congress could have made the remedial provisions mandatory in any civil action to collect delinquent contributions simply by amending Section 502, without adding Section 515. That Congress decided both to amend Section 502 and to add Section 515 belies Respondent's contention that Section 515 was merely a "technical change" and supports the broader reading of Section 515 as including both contractual and NLRA-based obligations to contribute.[1]

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[1] Respondent incorrectly asserts (Resp. Br. 23) that "Section 515 expanded on the pre-existing cause of action by permitting funds to enforce *plan* provisions beyond the basic contribution specified in the labor agreement" (emphasis in original). Both prior and subsequent to the MPPAA, Section 301 of the LMRA and Section 502 of ERISA have provided a federal forum for suits by plan trustees to enforce the provisions of trust agreements. *See, e.g., Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 366 n.2 (1984); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 564 n.4, 565 (1985). Throughout that period, Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), has provided in relevant part that a "civil action may be brought . . . by a . . . fiduciary . . . to redress . . . violations or . . . to enforce . . . the terms of the plan."

Moreover, Respondent errs in suggesting (Resp. Br. 23-24) that this Court's opinions in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ——, 95 L.Ed.2d 39 (1987), and *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. ——, 95 L.Ed.2d 55 (1987), support Respondent's contention that the duty imposed on an employer by Section 515 of ERISA to pay contributions the employer is obligated to make includes only contractual, and not NLRA-based, obligations to contribute. While this Court concluded in *Dedeaux*, 95 L.Ed.2d at 52-53, and *Taylor*, 95 L.Ed.2d at 64, that the preemptive force of Section 502(a) of ERISA was modeled after the

III. Requiring The Trustees Of Multiemployer Plans To Rely Upon The NLRA Enforcement Scheme Will Undermine Both The Financial Health Of Multiemployer Plans And The Ability Of Trustees To Carry Out Their Fiduciary Duties.

Respondent next suggests (Resp. Br. 24-34) that plan trustees can obtain the same relief that ERISA provides from the National Labor Relations Board (hereinafter "NLRB") and that requiring them to do so will not undermine the financial health of multiemployer plans or the ability of trustees to carry out their fiduciary duties. These suggestions are plainly wrong.

The NLRB cannot provide plan trustees with the full array of remedial measures provided by ERISA. To be sure, the NLRB's remedial discretion is quite broad, and, in the exercise of this broad discretion, the NLRB may require delinquent employers to pay trust funds the investment income that has been lost due to delinquencies, the administrative costs that have been incurred in collection efforts, and the liquidated damages that are provided for in many plan documents. *See, e.g., Stone Boat Yard*, 276 N.L.R.B. 1185, 1189 & n.10 (1985). But, in the absence of an authorizing provision in the plan documents, the NLRB cannot award either the "double interest" or the liquidated damages authorized by Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2). *See G.T. Knight Co.*, 268 N.L.R.B. 468, 470 (1983); *Merryweather Optical Co.*, 240 N.L.R.B. 1213, 1216 n.7 (1979). Moreover, the NLRB can award attorneys' fees and costs only

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extraordinary pre-emptive power of Section 301 of the LMRA, nothing in either *Dedeaux* or *Taylor* suggests that the duty imposed on an employer by Section 515 of ERISA is limited to contractual obligations to contribute, as Respondent contends. Indeed, as noted in the brief *amicus curiae* of the United States (at 14 and 26), this Court's statements in *Dedeaux* concerning statutory interpretation and the civil enforcement scheme of Section 502(a) of ERISA are consistent with the approach taken by Petitioners and the United States as *amicus curiae*.

in "extraordinary" circumstances (*H. Treffinger Repair Services, Inc.*, 281 N.L.R.B. No. 85, slip op. 2 n.3 (1986)), *i.e.*, where a "frivolous" defense has been interposed (*see Heck's, Inc.*, 215 N.L.R.B. 765, 765-67 (1974)), or where there has been extreme intransigence in flouting a judicially-approved NLRB order (*see, e.g., J.P. Stevens & Co., Inc.*, 244 N.L.R.B. 407, 458-59 (1979), *enf'd*, 668 F.2d 767, 777 (4th Cir. 1982)). Indeed, in *G.T. Knight*, the NLRB held that it could not award attorneys' fees against a delinquent employer even though the trust agreement required that such fees be paid in the case of delinquencies; the NLRB said that it "has no authority to require payments to be made under a contract as such. It is only when a contract breach undermines the collective-bargaining relationship in such a way that there is a refusal to bargain in violation of Section 8(a)(5) of the Act that the Board can find a violation and give a remedy" (268 N.L.R.B. at 470-71).

In any event, requiring plan trustees to rely upon the NLRB's *discretionary* remedial powers will in fact undermine both the financial health of multiemployer plans and the ability of plan trustees to carry out their fiduciary duties. ERISA provides that all employee service performed while an employer is obligated to make contributions to a plan must be credited to the employees, regardless of the source of the employer's contribution obligation, and regardless of whether the employer actually makes the required contributions. *See* 29 U.S.C. § 1053(b)(1)(G); *see also* Pet. Br. 34 & n.27; U.S. Br. 22 & n.15. Thus, plan trustees must be able to *compel* payment of delinquent contributions and reimbursement of associated administrative, investment, and litigation costs from employers if they are to maintain the financial health of the plans and effectively to carry out their fiduciary duties. For the reasons explained in our opening brief (at 28-35) and in the brief *amicus curiae* of the United States (at 23-26), only ERISA's *mandatory* remedies are suited to this task.

IV. Vesting District Courts With Concurrent Jurisdiction To Decide Claims By Trustees Of Multiemployer Plans Concerning Delinquencies Arising From NLRA-Based Contribution Obligations Will Not Undermine Either The NLRA's Comprehensive Administrative Enforcement Scheme Or The Congressional Purpose In Enacting Section 515.

Respondent also argues (Resp. Br. 34-41) that vesting district courts with concurrent jurisdiction to decide whether an NLRA-based contribution obligation exists will undermine the NLRA's comprehensive administrative enforcement scheme and, concomitantly, will frustrate the Congressional purpose motivating Section 515's enactment. These arguments are also without merit.

As explained in our opening brief (at 25-26) and in the brief *amicus curiae* of the United States (at 10-12), although the NLRA primarily relies on administrative enforcement to ensure uniformity and consistency of decision, Congress has in particular instances established judicial remedies for violation of NLRA-based rights. Our argument is that Section 515 of ERISA is one of those occasions. In Section 515 of ERISA, Congress has expressed its judgment that the NLRA's general concern for uniformity and consistency of decision is outweighed by ERISA's more specific concern for the protection of the special needs and interests of the participants and beneficiaries of multiemployer employee benefit plans and, accordingly, has created a judicial remedy for the enforcement of employer contribution obligations, including those arising out of the duty under Section 8(a)(5) of the NLRA to honor the terms of an expired collective bargaining agreement. While this judicial remedy may result in a small degree of inconsistency or nonuniformity in NLRA decision making, it will do so only because Congress has determined that judicial enforcement of these rights serves larger objectives.[2]

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[2] Of course, district courts adjudicating such cases should still look to NLRB case law in deciding whether any NLRA-based con-

That Congress authorized trustees, arbitrators, and courts to make these determinations when necessary to assess and collect withdrawal liability (29 U.S.C. § 1392 (a)) is indicative of this Congressional judgment. To be sure, as Respondent notes (Resp. Br. 37-40), trustees, arbitrators, and courts do not actually assume jurisdiction in withdrawal liability actions to determine whether an unfair labor practice has been committed. But they do decide whether any NLRA-based contribution obligation exists—*i.e.*, whether an impasse exists, whether a unilateral change has occurred, and whether the employer has any defensible reasons for making the unilateral change. *See, e.g., Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986); *I.A.M. National Pension Trust Fund v. Schulze Tool and Die Co.*, 564 F. Supp. 1285, 1289-96 (N.D. Cal. 1983); *Garland Coal Co.*, 7 Employee Benefits Cas. (BNA) 1771, 1779-82 (Dreyer, Arb. June 10, 1986); *Marvin Hayes Lines, Inc.*, 8 Employee Benefits Cas. (BNA) 1834, 1840-44 (Weckstein, Arb. March 16, 1987); *E.A. Nord Co.*, 8 Employee Benefits Cas. (BNA) 2171, 2175-77 (Axon, Arb. April 11, 1987).[3]

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tribution obligation exists and should exercise their discretion to determine whether or not their proceedings should be stayed when an NLRB judgment with respect to the specific issue presented will soon be forthcoming and the trustees of the multiemployer plan had an adequate opportunity to litigate the issue in the NLRB proceedings. *See Northern California District Council of Hod Carriers v. Opinski*, 673 F.2d 1074 (9th Cir. 1982). Moreover, district courts should sensitively employ the rules of joinder (Fed. R. Civ. P. 19), transfer (28 U.S.C. § 1404(a)), consolidation (Fed. R. Civ. P. 42), and res judicata/collateral estoppel to ensure that the exaggerated parade-of-horribles discussed in the brief *amicus curiae* of the Chamber of Commerce (at 8-11) do not result.

[3] Respondent incorrectly asserts (Resp. Br. 39 n.32) that under Section 4218 of ERISA, 29 U.S.C. § 1398, "the mere existence of a 'labor dispute' . . . is sufficient to prevent a withdrawal" and that "withdrawal liability disputes in the context of a labor dispute require the court to decide *only* whether a labor dispute exists, not

The identical decision must be made by courts in Section 515 actions. Thus, while the effect of the decisions differs, the inroad on the NLRB's exclusive authority to interpret the NLRA, and the concomitant inconsistencies, if any, that result in labor law doctrine from concurrent district court adjudication of these questions, is the same.[4]

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the subtle question of whether and when an impasse was reached." (Emphasis in original.) While Section 4218(2) provides that "an employer shall not be considered to have withdrawn from a plan solely because . . . an employer suspends contributions under the plan during a labor dispute involving its employees" (29 U.S.C. § 1398(2)), Section 4218 does not protect an employer whose obligation to contribute has permanently ceased, and, accordingly, a withdrawal may occur regardless of whether a labor dispute continues to exist. *See* 126 Cong. Rec. 23038 (1980) (remarks of Rep. Thompson); PBGC Op. Letter 86-4 (Feb. 28, 1986); *Schulze Tool*, 504 F. Supp. at 1295-96; *Garland Coal Co., supra*; *Marvin Hayes Lines, Inc., supra*; *E. A. Nord Co., supra*. In addition, Section 4218(2) of ERISA, by its terms, addresses only the issue of whether an employer "shall . . . be considered to have withdrawn from a plan." Section 4218(2) does not define the date of a withdrawal which has been determined to have taken place. Once a complete withdrawal has been determined to have taken place, the date of the complete withdrawal is governed by Section 4203(e) of ERISA, 29 U.S.C. § 1383(e), which provides: "For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." Thus, "the date of the withdrawal is the date on which the employer ceased to have an obligation to contribute . . . even if, as is the usual case, that date is not the date on which Section 4218(2) of ERISA [the labor dispute exemption] ceased to apply to the employer." PBGC Op. Letter 86-4 (Feb. 28, 1986). *See Garland Coal Co., supra*; *Marvin Hayes Lines, Inc., supra*; *E.A. Nord Co., supra*. Thus, even when a withdrawal liability dispute occurs in the context of a labor dispute, a court may have to decide whether any NLRA-based contribution obligation exists.

[4] Contrary to Respondent's suggestion (Resp. Br. 39 n.31), cases involving the issue of when the obligation to contribute ceased are not "historical anomalies" and will recur. Even though the initial cases have concerned the effective date of ERISA's withdrawal liability provisions, the date of an employer's withdrawal will continue to be a pivotal issue in cases where an employer seeks to take

Moreover, Respondent simply errs in suggesting that district court adjudication of claims by the trustees of multiemployer plans concerning delinquencies arising from NLRA-based contribution obligations will undermine the Congressional purpose in enacting Section 515. As noted above, Congress enacted Section 515 to provide trustees with a single, efficient cause of action for collecting delinquent contributions in order to promote the financial health of multiemployer plans; allowing trustees to seek recovery of delinquencies arising from NLRA-based contribution obligations will promote this purpose. To be sure, since an employer may have defenses to the trustees' claim that an NLRA-based contribution obligation exists,[5] a collection action of this sort may be more complicated than a collection action involving a simple contractual

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advantage of changes in the plan's funding status which would significantly affect its withdrawal liability. *See, e.g., Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987); *Garland Coal Co., supra.* In addition, the issue of when the obligation to contribute ceased may arise in other contexts under ERISA. For example, in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 776-77 (9th Cir. 1986), the employer filed a counterclaim under Section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), seeking to recover contributions which it alleged were mistakenly made to the trust fund after the old collective bargaining agreement had expired and before the new agreement was executed. The Ninth Circuit found that the contributions were not made mistakenly because the employer was obligated under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), to continue to make the contributions until the parties negotiated a new agreement or bargained in good faith to impasse, and the employer had not alleged that an impasse had been reached in negotiations with the union.

[5] Respondent's suggestion (Resp. Br. 37 n.29) that a serious question exists concerning whether an employer may raise such NLRA-related defenses in a Section 515 action is plainly wrong; this Court has said that defenses directed to the obligation to contribute, though not to collateral matters, *must* be entertained. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86, 88 (1982).

contribution obligation. But this Court has said that adjudication of such complexities is not inconsistent with Section 515's purpose; Congress intended that any defenses directed to the obligation to contribute would be adjudicated in a Section 515 action. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-88 (1982).[6]

V. In Determining Whether Congress Intended To Create An Independent Mechanism For The Enforcement Of an NLRA-Based Right, The Question Is Not Whether Congress has Expressed Its Intention With A Particular Degree Of Clarity, But Rather Whether The Relevant Interpretive Materials, Fairly Viewed, Indicate That Congress Intended To Create That Independent Mechanism.

Finally, running through Respondent's brief is the suggestion (Resp. Br. 12-13, 18-19, 34-37) that Congress must clearly and manifestly express its intention to create an exception to the NLRB's general primary jurisdiction over NLRA-related questions before such an exception may be recognized. We, of course, believe that the language, legislative history, and structure of Section 515 of ERISA satisfy Respondent's "clear and manifest" expression standard. But, more fundamentally, we agree with the brief *amicus curiae* of the United States (at 27-28) that Respondent's standard is wrong. The question is not whether Congress has expressed its intention with a particular degree of clarity; the question is whether the relevant interpretive materials, fairly viewed, indi-

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[6] Respondent errs in suggesting (Resp. Br. 40-41) that allowing district courts to entertain NLRA-related questions will result in the needless expenditure of plan assets. Allowing plan trustees to initiate such actions in federal court does not require them to do so; trustees retain the option of filing charges with the NLRB and of seeking collection of any delinquencies in that forum. *See* 29 U.S.C. § 160(b); 29 C.F.R. § 102.9. The trustees can determine which forum is likely to be the least expensive and most efficient; and their choice may be reviewed under well-established fiduciary standards.

cate that Congress intended to create an additional remedy for enforcement of NLRA-based rights. Thus, this Court has several times found exceptions to the NLRB's general primary jurisdiction without citing to any statement of Congressional intent explicitly supportive of such a finding; rather, the Court has found the intention to create an independent mechanism for enforcement of an NLRA-based right to be implicit in the particular statutory scheme in issue. *See, e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. at 83-86 (ERISA and LMRA); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 626, 633-37 (1975) (Sherman Act); *Vaca v. Sipes*, 386 U.S. 171, 176-88 (1967) (LMRA). Analogously, this case presents the question of whether Congress has created an independent mechanism for the enforcement of an NLRA-based right in Section 515 of ERISA; the language, history, and structure of Section 515 of ERISA require an affirmative answer to that question.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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